

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROGER A. SMITH)	
Claimant)	
VS.)	
)	Docket No. 233,435
KENNY'S ELECTRICAL COMPANY, INC.)	
Respondent)	
AND)	
)	
HAWKEYE-SECURITY INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant requests review of the preliminary hearing Order of Administrative Law Judge Bruce E. Moore dated June 12, 1998, wherein the Administrative Law Judge denied claimant benefits finding claimant had failed to sustain his burden of proof that notice of accident was provided within either 10 days or 75 days.

ISSUES

- (1) Did claimant have just cause for not notifying respondent of his accident within 10 days after his last day worked?
- (2) Did claimant provide respondent notice of accident including the time, place, and particulars within 75 days after the date of accident?
- (3) Is claimant entitled to medical benefits?
- (4) Is claimant entitled to temporary total disability benefits after February 8, 1998?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record, the Appeals Board, for preliminary hearing purposes, finds as follows:

Claimant alleges a series of accidental injuries from August 1, 1997, when he began his employment with respondent, through his last day of work, February 6, 1998. Claimant acknowledges his back problems would develop while he was at work and would generally

resolve over the weekend. Towards the end of his employment with respondent, claimant's back problems did not resolve over the weekend, but instead became continuous and more severe. He testified regarding a particular job on February 6, 1998, which required him to do more crawling and caused his back symptoms to worsen even more.

On Sunday, February 8, 1998, claimant was brushing his teeth when he dropped his toothbrush. Claimant bent over to retrieve the toothbrush and experienced immediate and severe back pain which required he go to the emergency room. Claimant ultimately went to Dr. Neonilo A. Tejano at the Hertzler Clinic and was scheduled for back surgery in April 1998. The surgery was not performed as the doctor had questions regarding whether claimant's injury was related to his employment.

Claimant acknowledges he did not advise respondent of a work-related injury within 10 days as is required by K.S.A. 44-520. The only contact claimant had with respondent during that time was a phone call to his supervisor, Ron, advising him of his back problems, which claimant failed to relate to his work. Claimant acknowledges he knew he was to provide notice to respondent of an accidental injury in a timely fashion. However, when asked why he did not advise the respondent of the injury, claimant testified that he liked his employers, he liked his job, and he "didn't seem to want to make waves."

Claimant suffered a work-related back injury in 1992 and underwent a two level fusion with Dr. Tejano. That matter was settled for a lump sum before claimant began his employment with respondent. Thereafter, claimant had ongoing symptoms which required periodic treatments with a chiropractor. He also returned to Dr. Tejano in 1996 with the back pain. This was during a time when claimant was self-employed as an electrician.

K.S.A. 44-520 requires notice be provided to the employer including the time, place, and particulars thereof within 10 days of the date of accident. The 10 day notice does not bar proceedings under workers compensation if the claimant can show that the failure to provide notice was due to just cause, except no proceeding for compensation shall be maintained unless notice is given to the employer within 75 days after the date of accident.

It is acknowledged claimant did not provide notice of the work-related accident within 10 days of the date of accident. However, disputes do exist regarding whether there was just cause for this untimely notice and whether claimant notified respondent within 75 days of the date of accident. Claimant provided a written letter to respondent on April 13, 1998, advising that he had suffered a series of injuries to his low back through repetitive work during the periods August 1, 1997, through February 6, 1998, sufficient to prevent claimant from working. The letter of April 10, 1998, to respondent was sent by certified mail and is acknowledged as received on April 13, 1998, both dates within 75 days of claimant's February 6, 1998, last date of work. The Appeals Board finds the written letter of April 10, 1998, would be sufficient to provide notice to respondent of a work-related injury including the time, place, and particulars associated with the injury. Therefore, the Appeals Board finds notice was provided within 75 days of claimant's date of accident.

The Appeals Board must next consider whether claimant had just cause for delaying the notice to respondent for this length of time. Claimant admits he suffered increased symptomatology while employed with respondent. Claimant admits the symptoms in his low back would resolve over the weekend and then worsen during his work week. This weekend benefit ceased as claimant approached his last day of work with respondent. Claimant admits he was aware of his obligation to notify respondent of any work-related injuries, but in this instance was reluctant to do so because he liked his employers, he liked his job and "I just didn't seem to want to make waves"

K.S.A. 44-520 is specific that notice must be provided to respondent in a timely fashion. A worker's reluctance to "make waves" on the job does not constitute just cause for not providing notice to respondent of a work-related injury. This claimant had experience with the workers compensation system having suffered a prior injury in 1992, undergone surgery, and resolved his conflict by settlement hearing and a lump sum award. Claimant acknowledged he was aware of the requirement that he provide notice to respondent in a timely fashion but simply did not do so. Under these circumstances, the Appeals Board finds that claimant's reluctance to "make waves" does not constitute just cause for failing to provide notice to respondent of an accidental injury in a timely fashion. Therefore, the decision by the Administrative Law Judge denying benefits in this matter should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bruce E. Moore dated June 12, 1998, should be, and is hereby, affirmed, and claimant is denied benefits for having failed to provide notice to respondent as required by K.S.A. 44-520 and having failed to show just cause for this lack of notice.

IT IS SO ORDERED.

Dated this ____ day of August 1998.

BOARD MEMBER

c: James S. Oswalt, Hutchinson, KS
Douglas C. Hobbs, Wichita, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director